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SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

ANGELA Z. STEWART, PETITIONER

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA CRIMINAL CASE

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QUESTIONS PRESENTED

1. Whether a state appellate court in reviewing a criminal conviction is bound to apply the standard of appellate review mandated by this court in Jackson v. Virginia, 443 U.S. 307 (1979), of considering not whether there is any evidence to support the conviction but, whether, viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt?

2. Whether, viewing the circumstantial evidence of record in the light most favorable to the prosecution, a rational trier of fact could justify a finding of guilt of petitioner beyond a reasonable doubt?

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THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA CRIMINAL CASE

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the Supreme Court of South Carolina, dated and entered in this case on March 3, 1982.

OPINIONS BELOW

The Court of General Sessions for Orangeburg County, South Carolina filed no opinion. The opinion of the Supreme Court of South

Carolina (App. 29) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina was dated and entered on March 3, 1982. Petition for rehearing was denied on March 31, 1982 (App. 59). Order staying judgment was dated and issued April 6, 1982. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 8, Section 10, of Rules of Supreme Court of South Carolina

Counsel desiring to attack or argue against a decision of this Court, with a view

to asking the Court to review, modify, or overrule the same, must petition the Court in writing, at least four days before the call of the case in which such argument is sought to be made asking permission to do so, and set forth the reasons why the decision in question should be reviewed, modified or overruled.

STATEMENT OF CASE

Petitioner, Angela Z. Stewart, was tried by a jury in the General Sessions Court of Orangeburg County, South Carolina and convicted of the murder of her husband, Paul Stewart, who was found dead in bed in the marital home in Orangeburg, South Carolina with five bullets in his

body. She was sentenced to life imprisonment.

Briefly, the following are the facts pertinent to the petition: It is undisputed that on the evening of the homicide petitioner was at home with her husband at 8:00 P. M., a crucially disputed issue being whether on the basis of the circumstantial evidence of record the jury could find that petitioner's husband was shot and killed at 8:00 P. M. As stated in the opinion of the South Carolina Supreme Court, "In its prosecution, the State relied exclusively upon circumstantial evidence, the most crucial parts being as follows:

(1) The bullets removed from the deceased's body matched a bullet fired by defant from her husband's pistol at a snake

two years earlier in a friend's back-yard;

(2) The pathologist testified that Mr. Stewart died from the bullet wounds around 8:00 P.M.;

(3) Lewis Pinkston testified that the Stewart's blue pickup was at the house from 9:30 until 10:00 p.m., during which time Mrs. Stewart states she was driving it to Columbia;

(4) Mr. Stewart had quarreled with Mrs. Stewart and her daughter two days prior to the killing concerning how the daughter parked in the driveway; and

(5) Lewis Pinkston's testimony conflicted with that of Mrs. Stewart as to events occurring that evening after Mrs. Stewart requested the help of Pinkston and his girlfriend.

In regard to the circumstance that the bullets removed from the deceased's body matched a bullet fired by petitioner from her husband's pistol at a snake two years earlier in a friend's yard, the uncontradicted testimony of the witness, Luke Brown (presently a circuit judge) is that the pistol used to fire at the snake had been reported stolen from the Stewart's two years before the homicide. Moreover, the record is void that the bullet dug up from the yard is the bullet that was fired at the snake two years earlier.

In regard to the circumstantial evidence produced by the pathologist that Mr. Stewart died from the bullet wounds at 8:00 P.M. (while petitioner was admittedly at home with him), as demonstrated in the dissenting opinion of the

lower court, "it is obvious that the conclusion reached by Dr. Conradi as to the time of death was based purely upon surmise, conjecture and speculation . . ." and therefore is without any legal efficacy to support the conviction. Moreover, this conclusion of the pathologist is further conclusively rebutted by the uncontradicted testimony of the witness Syphrett and his wife that they heard five gunshots at 10:15 P. M. while the petitioner was on her way to Columbia, about 45 miles distant from the marital home, driving her daughter to her apartment where she attended school.

In regard to the testimony of the witness Lewis Pinkston that Stewart's blue pickup truck was at the house from 9:30 until 10:00 P. M. during which time

Mrs. Stewart states that she was driving it to Columbia, the uncontradicted testimony of three witnesses is that petitioner was in Columbia, South Carolina about the time the gunshots were heard by the witness Syphrett, his wife and daughter at 10:15 P. M. in Orangeburg, South Carolina. Moreover, in regard to the further testimony of Pinkston, the uncontradicted evidence demonstrates strange activity on the evening of the homicide by this witness, who has a prior record of conviction for attempted larcency at a house in Orangeburg. The record shows that he made four visits to the apartment adjacent to the Stewart home on the evening of the homicide. On the first visit he drove his car there at 6:00 or 6:30 P. M. (TR. 356, Lines 4-8). At

that time, before dark, he did not notice any of the vehicles, although he was sure that vehicles were there. On the second visit he went there at 9:30 P. M., but had no purpose for going there then (TR. 335, lines 19-20). At that time, while it was dark, he testified that he noticed the blue pickup truck as well as two other vehicles. The third time, apparently just prior to petitioner returning home, he drove to the apartment next to the Stewart residence at 12:00 midnight (TR. 357, lines 16-17). When he got to the apartment he blew his horn a few times and for some strange reason pulled away real quick (TR. 357, lines 16-21). The fourth time, apparently immediately after petitioner returned home, he drove back, got out of his car, knocked on the door

of the apartment next to the Stewart residence, and while standing there for several minutes, was confronted by petitioner who came out of her home excited and calling for help because "Mr. Stewart is having a heart attack and hemorrhaging" (TR. 374, line 11 to TR. 375, line 6). Pinkston then ran into the Stewart home with petitioner following him (TR. 376, lines 10-13), and led the way straight to Mr. Stewart's bedroom although he normally would not have known the location nor the number of bedrooms in the house (TR. 377, lines 5-17). In this connection, Pinkston's girlfriend, Melvenia McDonald, who lived in the adjacent apartment, testified she does not recall ever going to or visiting the Stewart residence with Pinkston (TR. 402, lines 15-24).

In regard to the circumstance that Mr. Stewart and petitioner's daughter had a quarrel two days before the homicide, the uncontradicted evidence is that as stated in the opinion of the Courtbelow, "the Stewart's enjoyed an apparent happy marriage," and the uncontradicted evidence is that on the evening of the day of the quarrel petitioner and her husband went to a dance together (TR. 470, lines 11-15).

As the opinion of the lower Court indicates, there was testimony that when petitioner returned to her home after midnight and found her husband lying in bed with blood trickling from his nose, a window pane was observed broken through which anyone could gain entrance into the home by unlocking the door.

At the close of the State's case

and also at the close of the entire case petitioner moved for a directed verdict of acquittal which was denied by the trial judge. Post verdict motions for a new trial and for judgment of acquittal nothwithstanding the verdict were also denied by the trial judge.

An appeal from the conviction and rulings of the trial judge was duly taken to the Supreme Court of South Carolina on a Case and Exceptions which included, inter alia, the following exceptions:

TR, Page 765 (Exception 1)

"1. The trial judge erred in refusing to direct a verdict or to grant judgment notwithstanding the verdict. This was error because the only reasonable inference to be drawn from all the evidence was that the homicide occurred

in Orangeburg at about 10:30 p.m., when the appellant was in Columbia."

TR, Page 765 (Exception 2)

"2. The trial judge erred in refusing to direct a verdict or to grant judgment notwithstanding the verdict. This was error because the only reasonable inference to be drawn from all the evidence was that several persons other than the appellant had equal opportunity to commit the crime, with no evidence upon which the jury reasonably could have concluded that appellant was guilty to the exclusion of the other possible perpetrators."

TR, Page 765 (Exception 3)

"3. The trial judge erred in refusing to direct a verdict of acquittal or to grant judgment of acquittal

notwithstanding the verdict. This was error because the State failed to prove beyond a reasonable doubt that the appellant was present in her home at the time the deceased was shot and killed therein."

TR, Page 765 (Exception 4)

"4. The trial judge erred in refusing to direct a judgment of acquittal or grant judgment of acquittal notwithstanding the verdict. This was error because the only reasonable inference to be drawn from all the evidence is that the appellant was not at home when the deceased was shot and killed therein."

In accordance with Rule 8, Section 10 of the Rules of the South Carolina Supreme Court, petitioner raised the constitutional issue of having her case reviewed in accordance with Due Process

by filing a petition (App.24) requesting permission to argue against the precedent of applying the standard of appellate review of considering only whether there is any evidence to support the conviction, contending that the Court should apply the standard of review mandated in Jackson v. Virginia, 443 U.S. 307 (1979).

This petition was denied by the South Carolina Supreme Court (App.28).

Upon appeal the Supreme Court of South Carolina granted petitioner a new trial, but applying its precedential standard of appellate review, the majority of the Court affirmed the trial judge's denial of petitioner's motion for a directed verdict of acquittal, with one justice dissenting. In the opinion of the dissenting justice he stated

that applying the traditional standard of appellate review he was convinced that "the record is without 'any' evidence to support appellant's conviction"; and "viewing the evidence in accordance with the standard of appellate review mandated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 560 (1979) it is even more convincing the trial judge erred in refusing appellant's motion for a directed verdict." Referring to the evidence, the dissenting justice held that "It is inconceivable that a rational trier of fact could justify a finding of guilt beyond a reasonable doubt based upon the evidence of record."

REASONS FOR GRANTING THE WRIT

1. The decision herein is not in accord with the applicable decision of this Court: The issues in this case are (1) whether a State appellate court is bound under the Due Process clause of the United States Constitution to apply the standard of appellate review in a criminal case of considering not whether there is any evidence to support a conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt; and (2) whether, on the basis of the circumstantial evidence of record upon which the State relies, a rational trier of fact could justify a finding of guilt

beyond a reasonable doubt.

On the first issue the decision by the Court below is in direct conflict with the holding by this Court in Jackson v. Virginia, 443 U. S. 307 (1979) that under the Due Process Clause of the United States Constitution a reviewing court in a criminal case upon appeal is required to apply the standard of appellate review of considering not whether there is any evidence to support the conviction but whether, viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt.

On the second issue, examining and analyzing the circumstantial evidence upon which the State relies referred to

herein and in the majority and dissenting opinions of the Supreme Court of South Carolina, as stated in the dissenting opinion, "It is inconceivable that a rational trier of fact could justify a finding of guilt beyone a reasonable doubt based upon the evidence of record. . . ."

It is therefore respectfully submitted that the majority of the Court below by refusing to apply the standard of appellate review required by the decision of this Court in Jackson v. Virginia, deprived petitioner of her right to Due Process guaranteed to her under the Fourteenth Amendment to the Constitution.

CONCLUSION

For the foregoing reasons, this

Court should grant the petition for a Writ of Certiorari and reverse that part of the decision of the Court below affirming the trial Court's denial of petitioner's motion for a directed verdict.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY

HONORABLE JOHN GRIMBALL, PRESIDING JUDGE

CRIMINAL NO. 80-GS-38-667

The State,

Respondent.

vs.

Angela Z. Maita Stewart,

Appellant.

PETITION

Pursuant to Rule 8, Section 10 of the rules of the Supreme Court of South Carolina, the undersigned attorneys for appellant, Angela Stewart, respectfully petition the Court to permit counsel for appellant to attack or argue against the decision of this Court in State v. Halyard,

___ S.C. ___, 264, S.E. 2d 841 (1980) holding that the standard of appellate review in a criminal case merely requires the Court to determine whether there is "any" evidence to support a conviction, referred to as the "traditional 'any evidence' standard of review" in the dissenting opinion of Mr. Justice Gregory in State v. Simpson, ___ S.C. ___, 272 S.E. 2d 431 (1980).

The basis for this request is the decision of Jackson v. Virginia, 443 U. S. 307, 99 S.Ct. 2781, 61 L.Ed. 560 (1979), also referred to in the dissenting opinion of Mr. Justice Gregory in State v. Simpson, supra. The United States Supreme Court in Jackson holds that in order to meet constitutional

requirements, appellate courts must apply the standard of review of considering not whether there was any evidence to support a conviction, but whether, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt.

For the foregoing reasons, it is respectfully submitted that the petition to permit appellant to argue against the standard of appellate review set forth in State v. Halyard, supra, be granted.

Respectfully submitted,

HAMMER, HAMMER AND BERNSTEIN

BY /s/ Henry Hammer
HENRY HAMMER
Columbia, South Carolina

WILLIAMS & WILLIAMS

By /s/ Charles H. Williams
CHARLES H. WILLIAMS

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Attorneys for Appellant

October 9, 1981.

THE SUPREME COURT OF SOUTH CAROLINA

Frances H. Smith
Clerk

P.O.Box 11330
Columbia, S. C.

October 21, 1981

Ms. Karen J. Williams
Messrs. Williams & Williams
P. O. Box 1084
Orangeburg, South Carolina 29115

Re: The State v. Angela Stewart

Dear Ms. Williams:

The Court has issued the following order on your Petition for permission to argue against precedent in your argument in the above matter:

"Petition denied.

/s/ J. Woodrow Lewis C. J.
For the Court

October 20, 1981."

Very truly yours,
/s/ Frances H. Smith
CLERK

/spr

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

The State,.....Respondent,

v,

Angela Z. Stewart,.....Appellant.

Appeal From Orangeburg County

John Grimball, Judge

Opinion No. 21656

Filed March 3, 1982

REVERSED AND REMANDED

Marshall B. Williams, Charles H. Williams and Karen L. Williams, all of Williams & Williams of Organgeburg; and Henry Hammer, of Hammer & Bernstein, of Columbia, for appellant.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes and Assistant Attorney General Lindy P. Funkhouser, all of Columbia; Solicitor Norman E. Fogle and Assistant

Solicitor, Joseph P. Mizzell, both of Orangeburg; and I. S. Leevy Johnson, of Columbia, for respondent.

LITTLEJOHN, A.J.: A jury found defendant Angela Z. Stewart guilty of the murder of her husband, Paul A. Stewart, and she was sentenced to life imprisonment. She appeals.

On April 13, 1980, Paul A. Stewart was found dead in bed at his Orangeburg residence with five .38 calibre bullets in his body. The entire house, including the bedroom, appeared undisturbed. No property was reported missing. However, there was a broken window pane in a side door and a rock was lodged between the broken pane and the door curtain. The broken pane provided access to the inside door knob and lock.

Fingerprint smudges found on the door knob were not identifiable.

The death was reported by Mrs. Stewart about 12:00 midnight. The pathologist who performed an autopsy on the body of the deceased testified that the time of death was approximately 8:00 p.m.

On August 20, 1980, Mrs. Stewart was charged with murder. In her statement given to the police officer the night of the killing and in her testimony at trial, she consistently maintained that she was not at home when her husband was killed. Her account is generally as follows:

(1) She and her daughter left the residence in a blue pickup around 8:30 p.m. for Columbia, about 40 miles away, to retrieve a repaired motorbike belonging to Mrs. Stewart's son and to return the daughter to her apartment in Columbia;

(2) When they left home, Mr. Stewart was lying in bed watching television;

(3) Upon returning home around midnight, she discovered his bleeding body and immediately telephoned for an ambulance; and

(4) She called for assistance from Melvina McDonald, a tenant residing in a nearby apartment owned by the Stewarts, and from Lewis Pinkston, McDonald's boyfriend, both of whom were talking outside the nearby apartment.

The boyfriend of Mrs. Stewart's daughter testified that the repaired motorbike was at his apartment in Columbia and that Mrs. Stewart and her daughter arrived between 9:30 and 10:00 p.m. and placed the motorbike in the blue pickup.

In its prosecution, the State relied exclusively upon circumstantial evidence, the most crucial parts being as follows:

(1) The bullets removed from the

deceased's body matched a bullet fired by defendant from her husband's pistol at a snake two years earlier in a friend's backyard;

(2) The pathologist testified that Mr. Stewart died from the bullet wounds around 8:00 p.m.;

(3) Lewis Pinkston testified that the Stewart's blue pickup was at the house from 9:30 until 10:00 p.m., during which time Mrs. Stewart states she was driving it to Columbia;

(4) Mr. Stewart had quarreled with Mrs. Stewart and her daughter two days prior to the killing concerning how the daughter parked in the driveway; and

(5) Lewis Pinkston's testimony conflicted with that of Mrs. Stewart as to events occurring that evening after Mrs. Stewart requested the help of Pinkston and his girlfriend.

Besides the testimony of Mrs.

Stewart and accompanying corroboration, her defense presented testimony by attorney Luke Brown (presently circuit court judge), a close friend with both Mr. and Mrs. Stewart. He testified that in 1976 he helped Mrs. Stewart purchase a .38 calibre pistol for Mr. Stewart after Mr. Stewart had expressed to Mr. Brown his desire for a handgun. Additionally, he testified that Mr. Stewart reported in 1978 that the gun had been stolen from his car. A nearby service station owner and his wife testified that they heard five shots around 10:30 p.m., thus discrediting the medical testimony placing the shooting at 8:00 p.m. Though this information was reported to investigating police officers the day after the killing, it was not revealed to the defense by the Solicitor's Office until the morning of the

trial.[1] Defense sought to cast suspicion upon Lewis Pinkston by questioning his activities the night of the killing and by pointing out conflicts between his testimony and that of his girlfriend, Melvina McDonald, and of Mrs. Stewart. Finally, several witnesses testified that the Stewarts enjoyed an apparent happy marriage.

On appeal, the defendant argues (1) that the trial judge erred in not granting her motion for directed verdict or motion for judgment n.o.v. for lack of sufficient evidence; (2) that the whole of the atmosphere surrounding and attending the trial was pervasive and hostile to the defendant and denied her a fair trial in violation of due

---

[1]As authorized in Brady v. Maryland, 373 US 83, 83 S.Ct. 1194 (1963), defense counsel had earlier filed a motion requesting the Solicitor to disclose any exculpatory information.

process rights; (3) that the trial judge erred in not granting defendant's request for continuance based upon suppression of exculpatory material (i.e., testimony of service station owner and his wife); and (4) that the trial judge erred in failing to give a curative instruction to the jury to disregard a portion of the State's closing argument.

Where the State relies exclusively upon circumstantial evidence in a criminal case, motion for directed verdict must be determined in light of whether the evidence constitutes positive proof of facts and circumstances which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced, to the exclusion of any other reasonable hypothesis. The evidence must be viewed most favorably to the State. State v. Hudson, Op. No. 21601, filed November

24, 1981.

In directing a verdict, the trial judge in effect tells the jury, "You must believe certain evidence because there is no reason to discredit it (i.e., no evidence to the contrary)." Here it was for the jury to determine whether testimony of Mrs. Stewart or of the witnesses who testified to the contrary was true. While the jury might have believed her testimony, they were not required as a matter of law to do so. We find no error by the trial judge in denying defendant's motions for directed verdict and for judgment n.o.v.

Defendant next asserts that happenings at trial served to render it inherently unfair. Among these were an overcrowded courtroom with outbursts from spectators and an improper gesture from a spectator to the jury.

The record shows that spectators

filled the courtroom seats to capacity and even stood against the walls. While the fact that spectators were allowed to overflow the seating capacity and stand in the courtroom would not normally be grounds for a new trial, it is the better practice to limit the audience to those who can be seated. An overcrowded courtroom tends to create an improper atmosphere and is not conducive to calm deliberations by the jury. The trial judge insisted more than once that spectators refrain from sitting on the row next to the jury box. After several outbursts of laughter from the spectators, the trial judge issued the following admonition:

> ...Now, this is not a show, it's not a public spectacle and any outbursts of laughter or exclamation of any kind from anyone who is in the courtroom observing these proceedings is completely and absolutely out of order and we should not have it and I cannot permit it. So, please,

> regardless of what's being answered do not make any outbursts of laughter. Nobody is trying to be funny in this situation. This is a most serious situation and the charges against the defendant and the defendant's rights are to be respected by you as well as by everybody else. So we cannot have that anymore. Do not do that.

During a recess in the trial, the forelady of the jury reported to the trial judge that one spectator continually glared at the jury with "obvious disgust" and that the same person had earlier made several opinionated remarks overheard by some jurors prior to being sworn. That person had left the courtroom when the complaint was made. Based upon this report, counsel for the defense moved for a mistrial arguing, "... that the jury has been duly--and unduly prejudiced and that we cannot receive a fair trial." The seriousness of the problem is indicated by the statement of the judge in overruling the motion:

All right. Well, of course, what I think was said to me this morning by the Sled Agent was that the foreman did not want to make any particular personal charge out of the matter against the spectator, whoever the spectator might have been. Let me say this to start off with, directing my attention to your motion for a mistrial, I have to overrule that. But I think it is a matter that should be taken up, and I think it's a matter of considerable seriousness because this, this is a serious matter, and I talked to the spectators in the courtroom along those lines yesterday after several outbursts of laughter which I did not approve of under any circumstances. The Foreman--The Forelady--did say that prior to the jury being chosen it was someone who was a spectator who stated in a voice that could be overheard by many of the prospective jurors before they were chosen an opinion concerning the guilt or innocence of the defendant. I have told the jury to disregard that and I think they understand that they, that has absolutely no bearing on anything that they do in this trial. ...
And it would be well if the spectators would understand that they are not to interfere with the jury by glaring at the jury, glances or faces or anything else. I--I don't know what it was, but I don't

> want to have to undertake to, to discipline any spectator in a matter of this serious nature, because it is disruptive to the procedure. So I would suggest to the spectators that they avoid looking at the jury panel and look at the attorneys and the witnesses because that of course is the main part of the trial.
> .....

We think it was an error for the trial judge to overrule the motion for a mistrial without having first explored the improper conduct of the spectator and without having first determined whether or not there was prejudice. Language found in State v. Salters, 273 SC 501, 257 SE2d 502 (1979) wherein the defendant's rights were potentially affected prejudicially by newspaper articles printed during his trial, applies equally to this case.

> In the instant case, the trial judge did not take the initial step of ascertaining whether the articles were prejudicial. In effect, the court

> held that no matter what the articles said or how prejudicial they may be, it was bound to presume that the jury had followed its instructions. Under the circumstances of this case, the sole reliance by the trial judge on his admonition was insufficient to assure the appellants a fair trial. . . . .
>
> We conclude that when the articles were brought to the court's attention, as these were by the attorneys, the court should have made a determination as to whether the information was in fact prejudicial so as to measure the "extent of the infection", [sic]. . . . .; and, we accordingly hold that where, as here, the articles contained prejudicial matter, is [sic] was imperative that the trial judge inquire as to whether any of the jurors had seen the articles, and if they had, to invoke the appropriate curative measures. Due to the trial court's failure to observe these precautionary measures, we are compelled to reverse and remand this case for a new trial.

The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U. S. Constitution and by Article I, §14, of the S. C. Constitution. While this

right does not require a "perfect" trial, the very heart of a "fair trial" embodies a disciplined courtroom wherein an accused's fate is determined solely through the exercise of calm and informed judgment.

> Ideal conditions, it is true, are not to be expected, and verdicts should not be set aside by an appellate court for misconduct in a trial, unless the evidence is clear and convincing that extraneous influences so interfered with the conduct of the trial, or so pressed upon the jury, as to become factors in the result. State v. Weldon, 91 SC 29, 74 SE 43 (1912).

It is the duty of the trial judge to see that the integrity of his court is not obstructed by any person or persons whatsoever. Shearer v. DeShon, 240 SC 472, 126 SE2d 514 (1962); 75 AmJur 2d Trial §40 (1974). His exercise of this duty will not be disturbed absent an abuse of discretion.

The State admits that the trial judge admonished the spectators on

several occasions, but contends that admonitions are routinely made during the course of a typical trial. We disagree. It is true that a trial judge must occasionally instruct courtroom bystanders as to expected proper conduct. Rarely, however, are we faced with situations involving an over-crowded and noisy courtroom requiring several admonitions. These conditions clearly interfered with the conduct of the trial.

The sole reliance by the trial judge on his instructions to the jury to disregard improper spectator conduct and on his several admonitions to the courtroom in general was insufficient to assure defendant a fair trial. Denial of this right requires a new trial.

The necessity of a new trial renders moot the remaining two exceptions ([1] Brady violation and [2] improper closing argument).

Having concluded that defendant was denied her right to a fair trial, we reverse the verdict and remand for a new trial.

REVERSED AND REMANDED.

LEWIS, C.J., GREGORY and HARWELL, JJ., concur. NESS, A. J., concurs and dissents.

NESS, A.J. (concurring and dissenting): I concur in the majority opinion that prejudicial error was commited at trial. I also believe the evidence is insufficient to support the conviction. I would reverse and order a judgment of acquittal.

The crucial issue presented by the motion for a directed verdict is whether the deceased, Paul Stewart, was shot and killed at 8:00 P.M. on the evening of the homicide. It is undisputed that his wife, the appellant, was at home at that time.

The State concedes its case rests solely on circumstantial evidence, the crucially disputed essential circumstance is whether the victim was shot and killed at 8:00 P.M. If this circumstance were established by competent proof it would be proper to submit the issue of appellant's guilt to the jury. On the other hand, if this proof was based on surmise, conjecture and speculation, the evidence would be insufficient and erroneous to submit the case to the jury.

The primary testimony relied on by the State to establish the time of death at 8:00 P.M. was the testimony of Dr. Sandra Conradi, a forensic pathologist.

On direct examination, Dr. Conradi testified she examined the body of the deceased at 12:00 Noon on the day following the homicide, and estimated that death had occurred between twelve and twenty-four hours earlier, with sixteen

hours as a good estimate, thus speculating that the death occurred at 8:00 P.M. Her testimony was, (Tr. 195 ff. 13-25):

Q. And could you tell us in your medical opinion how long the body had been dead.

A. I estimated the body had been dead between twelve and twenty-four hours with sixteen hours as a good estimate in my opinion as to the length of time.

Q. So from 12:00 o'clock when you examined the body, you said sixteen hours before that?

A. Yes, sir.

On cross examination, Dr. Conradi testified: Tr. 203 f. 15, Tr. 204 f. 4:

Q. Now, you have narrowed down, you said, that you examined him at 12:00 o'clock, is that correct?

A. Yes, sir.

Q. The following day?

A. Yes, sir.

Q. And you said the cause of death was somewhere between twelve and twenty-four hours?

A. Yes, sir.

Q. And when you say sixteen is that because you are taking the middle? The average?

A. Oh, sixteen, sixteen would be in my opinion a good estimate as to the time, a little closer to the twelve than the twenty-four.

Q. Could it vary as much as - could it vary sixteen hours either way?

A. It could, but in my opinion it may vary two hours either way. (Emphasis added).

From a review of this testimony, it is obvious that the conclusion reached by Dr. Conradi as to the time of death was based purely upon surmise, conjecture and speculation. This proof offered by the State to establish the time of death at 8:00 P.M. is insufficient to support the conviction.

We have uniformly held where the State relies solely upon circumstantial evidence to support a conviction, as it does here, "it is necessary that every circumstance be proved beyond a reasonable doubt---. It is

It is not sufficient that they create a probability, though a strong one," and, "on a motion for a directed verdict the trial judge----should not refuse to grant the motion where the evidence merely raises a suspicion of guilt." State v. Littlejohn, 228 S.C. 324, 89 S.E. 2d 924 (1955); State v. Jones, 241 S.C. 271, 128 S.E. 2d 114 (1962).

Reviewing this evidence in the light most favorable to the State as required by the "any" evidence rule, State v. Bailey, 253 S.C. 204, 170 S.E. 2d 376 (1969), I am convinced that the record is without "any" evidence to support appellant's conviction.

Moreover, viewing the evidence in accordance with the standard of appellate review mandated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 560 (1979), it is even more convincing the trial judge

erred in refusing appellant's motion for a directed verdict. This standard of appellate review required us to consider not whether there is "any" evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt.

It is inconceivable that a rational trier of fact could justify a finding of guilt beyond a reasonable doubt based upon the evidence of record, because of the following:

1. The speculative nature of Dr. Conradi's testimony relating to the crucial issue as to the time of death;
2. The testimony relating to the broken window pane through which anyone could gain entrance into the

home by unlocking the door;

3. The testimony of the impartial witness, Syphrett, that he heard five gunshots at 10:15 P.M., conclusively rebutting the speculative conclusion by Dr. Conradi as to the time of death;

4. The strange activity of the State's witness, Pinkston, on the evening of the homicide, that angry remarks were directed to Pinkston's girlfriend by the deceased for messing up the yard;

5. The testimony concerning car doors slamming in the victim's yard about 10:00 P.M.;

6. The uncontradicted testimony of the three witnesses that appellant was in Columbia about the time the gunshots were heard;

7. The testimony of Judge Brown that

the weapon used by the appellant to fire at a snake in the neighbor's yard had been lost by the Stewarts for several years before the homicide;

8. The inability of any witness to verify that the bullet dug up from the neighbor's yard was the same one fired by the appellant at the snake;

9. The testimony that the bullets taken from the victim's body and the matching bullet dug up from the neighbor's yard could have been fired from either a .357 Ruger Security 6 or a Manuel Escoden, as well as a .38 caliber.

I would reverse and remand with direction to enter judgment for appellant.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE, Respondent,

versus

ANGELA Z. STEWART, Appellant.

APPEAL FROM ORANGEBURG COUNTY
THE HONORABLE JOHN GRIMBALL
PRESIDING JUDGE

Opinion No. 21656

PETITION FOR REHEARING

To the Honorable Chief Justice and Justies of the Supreme Court:

Your petitioner, the appellant, respectfully prays that this Court grant a rehearing of that portion of its decision of March 3, 1982, affirming the

trial judge's denial of appellant's motion for a directed verdict of acquittal, upon the following grounds:

FIRST

The majority opinion of this Court concluding that the evidence was sufficient to withstand the motion for a directed verdict of acquittal misapprehended that the applicable standard of appellate review requires a reviewing Court to consider not whether there is any evidence to support a conviction, but whether, viewing the evidence in the light most favorable to the prosecution there is sufficient evidence to justify a rational trier of fact to find guilt beyond a rea. onable doubt. Jackson v. Virginia, 443, U. S. 307, 99 S.Ct. 2781, 61 L.Ed. 560 (1979).

SECOND

The majority opinion of this Court concluding that the evidence was sufficient to withstand the motion for a directed verdict of acquittal was obviously reached by applying the traditional standard of appellate review of considering only whether there is "any" evidence to support the conviction, notwithstanding appellant's petition, dated October 9, 1981, which was denied by order of this Court, dated October 21, 1981, to argue against the application of this standard and in support of applying the constitutional standard of appellate review, as set forth in Jackson v. Virginia, 443 U. S. 307, 99 S.Ct. 2781, 61 L.Ed. 560 (1979), which requires a reviewing Court in a criminal

case to consider not whether there is "any" evidence to support a conviction but whether viewing the evidence in the light most favorable to the prosecution there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt.

In concluding that Jackson v. Virginia, supra, has no application here, it is respectfully submitted that this Court overlooked that the requested applicable standard of appellate review is constitutionally required to be applied under the Due Process clause of the United States Constitution, which if applied would require reversal of the trial judge's denial of the motion for a directed verdict of acquittal.

THIRD

In reaching its decision that the

evidence was sufficient to withstand the motion for a directed verdict of acquittal, the majority of this Court considered as crucial evidence the conclusion of Dr. Sandra Conradi, the forensic pathologist, that "Mr. Stewart died from the bullet wounds around 8:00 P.M."

In reaching its decision and considering the conclusion of the pathologist, the majority of this Court misapprehended and overlooked the total lack of its legal efficacy which because of its highly speculative nature was legally insufficient and without legal efficacy as to the crucially disputed fact of whether Mr. Stewart died at 8:00 P. M.

For the reasons set forth above and in the Briefs filed by appellant and

advanced at oral argument, it is respectfully urged that a rehearing be granted, and that upon such rehearing the judgment of conviction be reversed with direction to enter judgment of acquittal.

Respectfully submitted,

WILLIAMS AND WILLIAMS

BY: /s/ Marshall B. Williams
Marshall B. Williams

HAMMER AND BERNSTEIN

BY: /s/ Henry Hammer
Henry Hammer

Attorneys for Appellant

THE SUPREME COURT OF SOUTH CAROLINA

Frances H. Smith
Clerk

P.O.Box 11330
Columbia, S.C. 29211

March 31, 1982

Henry Hammer, Esquire
Messrs. Hammer & Bernstein
1019 Assembly Street
Columbia, South Carolina 29201

Re: The State v. Angela Z. Stewart

Dear Mr. Hammer:

Your Motion to Stay Remittitur and Continue Appeal Bond has been forwarded to members of the Court.

Your Petition for Rehearing in this matter was denied in the following order:

"Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

I would grant.

s/ J. B. Ness A.J.

March 31, 1982"

Very truly yours,

/s/ Reba S. Mims
DEPUTY CLERK

RDM/cm

cc: The Honorable Brian P. Gibbes

The Supreme Court of South Carolina

Frances S. Smith
Clerk

P.O.Box 11330
Columbia, S.C.29211

April 6, 1982

Henry Hammer, Esquire
Messrs. Hammer & Bernstein
1019 Assembly Street
Columbia, South Carolina 29201

Re: The State v. Angela Z. Stewart

Dear Mr. Hammer:

The Court has this day granted your Motion to Stay Remittitur and Continue Appeal Bond in the above case in the following order:

"Motion granted.

s/ J. Woodrow Lewis C.J.
For the Court

April 6, 1982"

Very truly yours,

/s/ Frances H. Smith
CLERK

FHS/cm

cc: The Honorable Brian P. Gibbes